Supreme Court, U.S.
FILED

(1) No. 941493 MAR 10 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ALEX A. MERVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Donald J. Goldberg
(Counsel of Record)
Creed C. Black, Jr.
Leslie H. Smith
BALLARD SPAHR ANDREWS & INGERSOLL
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Petitioner

140 pp

QUESTION PRESENTED

Whether a good faith belief in the lawfulness of one's conduct is a defense to a crime requiring proof of fraudulent intent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. Procedural Background	4
B. Factual Background	6
C. The Good Faith Defense . . .	12
REASONS FOR GRANTING THE WRIT	21
A. There Is Confusion Among the Circuits As To Whether A Defendant's Good Faith Belief In The Lawfulness of His Conduct Is A Defense To Specific Intent Crimes . . .	27

TABLE OF CONTENTS

Page

B. The Decision Of The Third Circuit Is Erroneous. A Good Faith Belief In The Lawfulness Of One's Actions Necessarily Negates Specific Intent To Defraud 38

CONCLUSION 46

APPENDIX A A1

APPENDIX B A76

APPENDIX C A78

APPENDIX D A80

TABLE OF AUTHORITIES

CASES **Page**

Donovan v. United States, 114 S. Ct. 873 (1994) 24

Ratzlaf v. United States, 114 S. Ct. 655(1994) 16, 22, 24, 41

Shirk v. United States, 114 S. Ct. 873 (1994) 16

Staples v. United States, 114 S. Ct. 1793 (1994) 22

In re Topper, 229 F.2d 691 (3d Cir. 1956) 43

United States v. Aitken, 755 F.2d 188 (1st Cir. 1985) 33

United States v. Aversa, 984 F.2d 493 (1st Cir. 1993) 23

United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) 40

United States v. Buford, 889 F.2d 1406 (5th Cir. 1989) . . . 24, 28, 30

United States v. Bush, 599 F.2d 72 (5th Cir. 1979) 43

United States v. Casperson, 773 F.2d 216 (8th Cir. 1985) 39

TABLE OF AUTHORITIES

CASES **Page**

United States v. Cavin, 39 F.3d 1299 (5th Cir. 1994) 38

United States v. Chavis, 772 F.2d 100 (5th Cir. 1985) 31

United States v. Costanzo, 4 F.3d 658 (8th Cir. 1993) 25

United States v. Davis, 583 F.2d 190 (5th Cir. 1978) 24, 28, 31

United States v. Eisenstein, 731 F.2d 1540 (11th Cir. 1984) 43

United States v. Goodchild, 25 F.3d 55 (1st Cir. 1994) 25, 33, 40

United States v. Goss, 650 F.2d 1336 (5th Cir. 1981) 39

United States v. Gross, 961 F.2d 1097 (3d Cir.), cert. denied, 113 S. Ct. 439 (1992) 41

United States v. Mathies, 350 F.2d 963 (3d Cir. 1965) 38

United States v. Monteleone, 804 F.2d 1004 (7th Cir. 1986), cert. denied, 480 U.S. 931 (1987) 41

TABLE OF AUTHORITIES

CASES **Page**

United States v. Martin, 408 F.2d 949 (7th Cir.), cert. denied, 396 U.S. 824 (1969) 38

United States v. Peterson, 513 F.2d 1133 (9th Cir. 1975) . . . 24, 28, 32

United States v. Rhone, 864 F.2d 832 (D.C. Cir. 1989) . 24, 28, 31, 32

United States v. Schilleci, 545 F.2d 519 (5th Cir. 1977) . . 24, 28, 29, 30

United States v. Sherer, 653 F.2d 334 (8th Cir.), cert. denied, 454 U.S. 1034 (1981) 39

United States v. Shirk, 981 F.2d 1382 (3d Cir. 1992) 16

United States v. Tashjian, 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981) 38

United States v. Walters, 913 F.2d 388 (7th Cir. 1990) 42

United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) 21

In re Winship, 397 U.S. 358 (1970) . 40

TABLE OF AUTHORITIES

Page

STATUTES

18 U.S.C. § 152 . . . . . 3, 4, 10, 38

18 U.S.C. § 371 . . . . . 4, 29

18 U.S.C. § 1001 23

18 U.S.C. § 1005 23

18 U.S.C. § 1029 23

18 U.S.C. § 1030 23

18 U.S.C. § 1341 23

18 U.S.C. § 1343 23

18 U.S.C. § 1344 23

18 U.S.C. § 2511 29

18 U.S.C. § 2512 29

28 U.S.C. § 1254(1) 2

MISCELLANEOUS

Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions (4th ed. 1992) 43

TABLE OF AUTHORITIES

MISCELLANEOUS **Page**

Federal Criminal Jury Instructions for the Seventh Circuit, No. 6.04 (1980) 37

Federal Judicial Center, Pattern Criminal Jury Instructions (1988) 37

Manual of Model Criminal Jury Instructions for the Ninth Circuit, No. 5.06 (1992) 36

Model Penal Code § 204(1) (Proposed Official Draft 1962) 41

Pattern Jury Instructions (Criminal Cases) for the Sixth Circuit, No. 2.06 (1991) . . . 36

Pattern Jury Instructions of The District Judges Association of the Eleventh Circuit, Criminal Cases, Basic Instruction No. 9.2 (1985) 26, 37

Pattern Jury Instructions of the Fifth Circuit Judges Association, Criminal Cases, No. 1.35 (1990) . . 37

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ALEX A. MERVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

Alex A. Mervis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The in banc opinion of the court of appeals (App., infra, at A1-A75)[1] is not yet reported. The initial panel opinion of the court of appeals, later vacated, is unreported. The opinion of the district court (App., infra, at A80-A91)[2] is unreported.

JURISDICTION

The court of appeals entered its judgment on January 23, 1995 (App., infra, at A78-A79). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

1 References to the Appendix are designated as "App. at A_."

2 References to the joint appendix filed with the Third Circuit are designated as "___a."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 152:

> Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage or promise thereof, for acting or forbearing to act in any case under title 11;
>
> . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner Alex A. Mervis ("Mervis") was convicted in the United States District Court for the Middle District of Pennsylvania. A jury found Mervis and his codefendant Darus Zehrbach guilty of one count of conspiracy to commit bankruptcy fraud (18 U.S.C. § 371) and two counts of bankruptcy fraud (18 U.S.C. § 152). Mervis was sentenced to seven months imprisonment and two years supervised release.

Mervis appealed his conviction to the court of appeals for the Third Circuit, contending, among other things, that the district court had impermissibly limited his good faith defense. Mervis

argued that the district court committed error by: (1) precluding defense counsel from arguing to the jury that Mervis' mistake of law made out a good faith defense; and (2) instructing the jury that the government was not required to prove that Mervis knew his actions were unlawful.

A three-judge panel of the court of appeals first affirmed the conviction by judgment entered March 28, 1994. One judge dissented, on grounds not at issue here. On Mervis' petition for rehearing, the court of appeals then vacated its March 28, 1994 judgment. The case was reargued in banc. On January 23, 1995, the court of appeals in banc affirmed the conviction (App., infra, at A1-A79). Four

judges dissented, again on grounds not at issue here.

B. **Factual Background**

Mervis' fraud conviction arose out of the 1989 bankruptcy sale of assets of Taylorcraft Aviation Corporation ("Taylorcraft"), a defunct aircraft manufacturer. At the time, Mervis was a 32-year-old stockbroker, newly hired by Drizos Investments, a Pittsburgh investment banking firm. Zehrbach, a client of Drizos Investments, engaged the firm to solicit potential investors with whose money he could purchase the Taylorcraft assets (507a). It was Mervis' first transaction as an investment banker (505a).

In late September 1989, Mervis located an investor, John Polychron, who agreed to form a limited partnership with Zehrbach to acquire the Taylorcraft assets (213a-215a; 218a-222a; 509a-511a). Around the same time, Taylorcraft's bankruptcy trustee, attorney Charles Szybist, obtained a $155,000 bid for the Taylorcraft assets from Leander Eckard (134a-135a). Szybist then notified all interested parties that he would accept Eckard's bid unless a higher one was received by noon on October 23, 1989 (135a-136a). All bidders higher than $155,00 would qualify to participate in a final auction to be held October 30, 1989 (136a).

On October 23, 1989, Zehrbach and Mervis delivered the Polychron-Zehrbach

partnership's $165,000 bid to Szybist, who informed them that he had received two other bids -- a $156,000 bid from Chester Baker (who lost interest shortly thereafter), and a $160,000 bid from Steven Starman (514a; 140a-142a). Zehrbach directed Mervis to contact Eckard and Starman to negotiate a "buy out" of their bidding positions (515a).

Following the instructions of Zehrbach, who Mervis believed to be a "bankruptcy expert" (528a), Mervis contacted Starman and Eckard (520a; 279a-280a). Starman agreed to withdraw from the final bidding for $40,000. His attorney, David Buelt, prepared an agreement to that effect; it expressly provided that the $40,000 payment was in consideration for Starman's company

"foregoing its right to bid" at the final auction (58a). Neither Starman nor his attorney had any question about the legality of the contract (202a; 204a-207a; 372a-373a; 378a; 527a-528a).

Eckard similarly agreed to withdraw from the bidding, for $50,000 (282a-286a). Mervis was told by his supervisors to contact Charles Vollmer, a local attorney, to have him draft a contract reflecting the agreement with Eckard (525a). Attorney Vollmer prepared the contract which, like the one entered with Starman, made plain that the $50,000 payment was in exchange for Eckard's promise "not to participate in the bidding process" for the Taylorcraft assets (57a). Eckard's own investment advisors assured him the arrangement was legal (298a).

Only after the contracts had been signed, and initial payments -- all by check or wire transfer -- had been made, did attorney Vollmer raise for the first time a "possibility" that the payments might be unlawful (61a-62a; 532a). He faxed a letter to Mervis and Robert Smith, president of an investment firm that was assisting Drizos Investments in the financing. The letter referenced 18 U.S.C. § 152, which Vollmer characterized as a "gray area," but at the same time noted that such deals were made in the hallways of bankruptcy sales "every day" (61a-62a; 317a-320a).

As a precaution, Smith and Steven Drizos, Mervis' boss, then requested another legal opinion (534a). Zehrbach arranged for Mervis to speak with James

Crane, an experienced bankruptcy lawyer (534a). Attorney Crane told Mervis that the contemplated arrangement, which he characterized as a merger of bidding interests, was "very much in fact legal" and that they "should not worry about it" (534a-535a). In light of Crane's legal opinion, both of Mervis' superiors were satisfied that the arrangements were legal; Mervis accordingly believed any issues had been fully resolved (559a).

After an initial postponement, the auction was finally held on November 15, 1989. The Zehrbach-Polychron partnership was the only bidder (151a-152a). Szybist accepted its $165,000 bid (539a).

C. The Good Faith Defense

Mervis had one defense at trial: He lacked the fraudulent intent required for conviction. As his counsel told the jury in closing, "[T]here is really only one factual dispute in this case, and that is whether [Mervis] had the fraudulent intent that's necessary to convict him under the bankruptcy code" (673a). Afterwards at sentencing, the prosecutor agreed: "It is absolutely clear, as [defense counsel] says, that at trial [Mervis] contested one issue and one issue only and that was fraudulent intent" (799a).

Mervis maintained that he had acted in good faith, honestly believing that it was lawful to pay potential competing bidders to refrain from bidding

at a bankruptcy sale. Testifying in his own defense, Mervis explained his reliance on the judgment and instructions of his more experienced superiors, the presence of supposedly knowledgeable bankruptcy "experts" in the deal,[3] and the open use of explicit legal agreements with all payments by check or wire transfer, all drafted and/or approved by a series of attorneys -- attorney Buelt, attorney Vollmer, and attorney Crane (502-576a). The reservations expressed by Vollmer for the first time late in the day on October 27, 1989, after the payments to Eckard and Starman had been made, were, in Mervis'

---

3 Mervis believed both Zehrbach and Starman to be bankruptcy "experts" who did such deals regularly (527-528a). In addition, Polychron was a former CEO of several RJR Nabisco subsidiaries (213-214a; 462a), and Smith had an "expertise" in bankruptcy (435a).

mind, "resolved" by the advice Mervis thereafter received from attorney Crane, which also fully satisfied both of his bosses, Smith and Drizos (552a, 559a, 572a).

Mervis' claim that he believed he was acting lawfully throughout the Taylorcraft deal had strong support in the testimony of both prosecution and defense witnesses, as well as in various documents introduced in evidence. At Mervis' sentencing, even government counsel characterized the case against Mervis as a "close" one: "[T]his is one of the closer cases on guilt that I think has come before the Court in a fraudulent -- fraud setting" (801a) (emphasis added).

During the charge conference, after the court had ruled that a good

faith instruction would be given, government counsel argued at length that the defense should be confined to mistakes of fact, and not extended to mistakes of law (605-608a). Government counsel then obtained a ruling that precluded defendants from arguing that "mistake of law" was a basis for their good faith defense:

> [Assistant U.S. Attorney]: My question remains unanswered and that is, you have held that the good faith defense will be given as to both defendants. Fine. Can it be argued that it applies if there is a mistake as to law; and I don't think it should be.
>
> THE COURT: No, I'm going to leave in your proposed sentence that --
>
> [Assistant U.S. Attorney]: It's not necessary for the government to prove that the defendants knew that what they were doing was illegal.
>
> THE COURT: Yes.

(607-608a) (emphasis added). The reference was to the government's requested definition of the statutory phrase "knowingly," which included a sentence that, "The Government is not required to prove that the defendant knew that his acts were unlawful" (Gov't. Proposed Instruction No. 5, 43a) (emphasis added).[4]

Defense counsel objected, asking that the sentence be deleted:

> Government proposed jury instruction number five has an instruction regarding the word knowingly. At the end of the second paragraph the instruction has the following sentence: Quote. The government is not required

---

4 The principal authority on which the government then relied in seeking this instruction was United States v. Shirk, 981 F.2d 1382 (3d Cir. 1992), which was later vacated and remanded by this Court in Shirk v. United States, 114 S. Ct. 873 (1994), in light of Ratzlaf v. United States, 114 S. Ct. 655 (1994).

to prove that the defendant knew that his acts were unlawful, period, end quote.

I ask that that be deleted from the instruction for three reasons. First of all, the government has cited no Third Circuit case law which supports the government's right to such an instruction. Second, Devitt and Blackmar in their instruction on the term knowingly at Section 1704 of their revised treatise does not include that particular sentence. Third, it has the potential of confusing the jury. In this case the issue is intent to defraud. The jurors may consider all evidence one way or the other on intent to defraud. By telling the jurors that the government is not required to prove that the defendant knew his acts were unlawful, the jurors may misconstrue that to mean that it is not relevant that the defendant did not know that his acts were unlawful. Because of this potential for confusion, because the instructions clearly state the burden of the government and do not state that that is one of the burdens of the government, because it hasn't been suggested that this is one of the burdens of the government and because it will not be suggested that that is one of the burdens of the government, in the interest of clarity and because of the burden in this case we ask, I ask that that sentence be deleted in

> the government's proposed jury instruction.

(608-609a) The court overruled the objection (609a).

Government counsel then began his closing argument by emphasizing that the court would instruct the jury that it was "not necessary. . .that the government prove that someone knew that what he was doing was illegal" (619a). The prosecutor repeated that statement a few moments later (623a). He then went on to characterize the defense as one based largely on the argument that, "[W]e didn't know it was illegal" (644a), which he essentially argued would be no defense at all under the court's instruction.

As promised, the court's charge on the "knowingly" element of the offense included the objected-to statement: "In

other words, an act is done knowingly if the defendant is aware of the act and is not committing the act through ignorance, mistake, or accident. The government is not required to prove that a defendant knew that his acts were unlawful" (717a) (emphasis added). The court then went on to give the "good faith" charge (719a), and to place the burden of disproving good faith on the government (719-720a).[5] At the conclusion of the court's charge, defendants renewed their objection to the court's inclusion of the underlined

---

5 The jury was told that the "burden of proving that a defendant did not act in good faith is on the government" (719a), and that the government must prove beyond a reasonable doubt that a defendant acted with the intent to defraud "and did not act in good faith" (720a).

sentence (726a). The court again overruled the objection (726a).

The jury convicted Mervis and Zehrbach on all three counts of the indictment.

In affirming the convictions, the Third Circuit rejected Mervis' challenge to the ways in which his good faith defense had been compromised. Upholding both the language of the district court's jury charge and the preclusion of closing argument on Mervis' mistake of law as a defense, the court flatly held that Mervis' professed belief in the lawfulness of paying other bidders was simply no defense: "In light of the elements making up the offense of bankruptcy fraud, particularly the element of intent to defraud the creditor or the trustee of the

bankruptcy estate, . . . a defendant's good faith belief in the lawfulness of his conduct is not a defense to bankruptcy fraud" (App., infra, at A43)(emphasis added).

REASONS FOR GRANTING THE WRIT

This case presents the Court with a timely opportunity to address the interplay between specific intent crimes and the defense of a good faith belief in the lawfulness of one's actions. The case further allows the Court to continue its recent clarifications of the intent element of significant federal criminal statutes. See, e.g., United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) (knowingly element of Protection of Children Against Sexual Exploitation Act,

18 U.S.C. § 2252, required government to prove defendant knew of both sexually explicit nature of material and age of performers); Staples v. United States, 114 S. Ct. 1793 (1994) (government required to prove defendant knew of characteristics of his firearm that brought it within National Firearms Act); Ratzlaf v. United States, 114 S. Ct. 655 (1994)(willfulness element of anti-structuring law required government to prove that defendant acted with knowledge that his conduct was illegal).

The issue of whether a defendant's good faith belief in the lawfulness of his actions is a defense to a specific intent crime has now created a readily apparent conflict among the circuits. It is also an issue of far-reaching importance; over

200 federal offenses require a fraudulent intent to convict, many of which are the more frequently charged offenses.[6]

The conflicting case law has largely arisen in the context of decisions addressing whether an "ignorance of the law is no defense" instruction is appropriate in cases involving specific intent crimes.[7] The Fifth Circuit, the

---

6 See, e.g., 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1001 (false statements to government); 18 U.S.C. §§ 1005, 1344 (bank fraud); 18 U.S.C. § 1029 (credit card fraud); 18 U.S.C. § 1030 (computer fraud).

7 That instruction is essentially the same as the jury charge at issue here. See United States v. Aversa, 984 F.2d 493, 502 (1st Cir. 1993) (instruction that, "It is not necessary that the United States prove that the defendant knew that the structuring of his currency transactions was unlawful,"

(continued...)

District of Columbia Circuit, and the Ninth Circuit have each found erroneous an instruction in specific intent cases that "ignorance of the law is no defense." See, e.g., United States v. Buford, 889 F.2d 1406 (5th Cir. 1989); United States v. Davis, 583 F.2d 190 (5th Cir. 1978); United States v. Schilleci, 545 F.2d 519 (5th Cir. 1977); United States v. Rhone, 864 F.2d 832 (D.C. Cir. 1989); United States v. Peterson, 513 F.2d 1133 (9th Cir. 1975). Most recently, the First Circuit has correspondingly upheld an instruction in a specific intent case that a defendant's good faith, albeit mistaken,

---

7(...continued)
viewed as equivalent to improper charge that mistake of law was no defense), cert. granted and judgment vacated, Donovan v. United States, 114 S. Ct. 873 (1994), in light of Ratzlaf v. United States, 114 S. Ct. 655 (1994).

belief in the lawfulness of his actions is a defense. See United States v. Goodchild, 25 F.3d 55, 59 (1st Cir. 1994).

The Third Circuit opinion here is in sharp conflict with all of the foregoing cases. Yet, it has some company in a recent Eighth Circuit opinion rejecting the notion that a good faith belief in the lawfulness of one's actions would insulate defendants from criminal liability for offenses requiring proof of fraudulent intent. See United States v. Costanzo, 4 F.3d 658, 664 (8th Cir. 1993).

This conflict is also manifest in the contradictory pattern criminal jury instructions issued by the various circuit courts. At least one circuit's "knowingly" instruction, like the one given to Mervis' jury and upheld by the

Third Circuit, explicitly recommends language that the government need not prove that a defendant knew his actions were illegal. See Manual of Model Criminal Jury Instructions for the Ninth Circuit, No. 5.06 (1992) ("the Government is not required to prove that the defendant knew that [his][her] acts or omissions were unlawful"). In contrast, pattern instructions in other circuits expressly caution against such a "knowingly" instruction in cases requiring a specific intent for conviction. See Pattern Jury Instructions (Criminal Cases) for the Sixth Circuit, No. 2.06 (1991); Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Criminal Cases, Basic Instruction No. 9.2 (1985); and Federal Judicial

Center Pattern Jury Instructions, Introduction, pp. iii-iv (1988).

The issue is certainly an appropriate one for plenary review and resolution.

A. There Is Confusion Among the Circuits As To Whether A Defendant's Good Faith Belief In The Lawfulness of His Conduct Is A Defense To Specific Intent Crimes.

The trial court's instruction to the jury that the government did not have to prove that Mervis knew his actions were illegal was tantamount to telling the jury that Mervis' good faith mistake or ignorance of the law was no defense. The Third Circuit's decision approving that instruction, and finding that a defendant's good faith belief in the lawfulness of his conduct is not a defense

to charges of bankruptcy fraud, is at odds with decisions of the Fifth Circuit, the District of Columbia Circuit, and the Ninth Circuit, which have reversed convictions in specific intent prosecutions due to the inclusion of a similar charge. See, e.g., United v. Schilleci, 545 F.2d 519 (5th Cir. 1977); United States v. Buford, 889 F.2d 1406 (5th Cir. 1989); United States v. Davis, 583 F.2d 190 (5th Cir. 1978); United States v. Rhone, 864 F.2d 832 (D.C. Cir. 1989); United States v. Petersen, 513 F.2d 1133 (9th Cir. 1975).

The Fifth Circuit in United States v. Schilleci, 545 F.2d 519 (5th Cir. 1977), reversed a conviction for conspiracy to intercept wire and oral communications in violation of 18 U.S.C.

§§ 371, 2511, 2512, on the basis of a charge virtually identical to the one given to Mervis' jury. The defense in Schilleci was remarkably similar to that presented by Mervis: "One of the defendant's main defenses throughout the trial was his belief that the action he took was not a violation of the law." Id. at 523. The district court instructed the jury that: "It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law." Id. (emphasis added). The instruction was held erroneous and the conviction reversed, because "[t]he ignorance of the defendant of the applicable law went to the heart of his denial of the specific

intent necessary for a violation of the law." Id. at 524.

Several years later, the Fifth Circuit in United States v. Buford, 889 F.2d 1406 (5th Cir. 1989), an income tax fraud case, again reversed a conviction on the basis of a similarly erroneous charge. The court held that the charge that "It is not necessary for the Government to prove that either defendant knew that a particular act or failure to act is a violation of law" erroneously relieved the government of its burden of proof. Id. at 1409. The court found that the jury should have been told it could consider defendants' ignorance of the law. Id. Although Buford involved income tax violations, the Fifth Circuit relied upon a string of Fifth Circuit precedents that

included non-tax crimes. See, e.g., United States v. Davis, 583 F.2d 190, 193-194 (5th Cir. 1978) (reversing convictions for willful violations of weapons and munitions statutes where district court had instructed jury that ignorance of the law does not constitute a defense "because ignorance of the law goes to the heart of the defendant's denial of specific intent"). See also United States v. Chavis, 772 F.2d 100, 108 (5th Cir. 1985) (in mail fraud prosecution, "Ignorance of the law is relevant to the issue of specific intent, and generally a defendant is entitled to have the jury so instructed").

The District of Columbia Circuit in United States v. Rhone, 864 F.2d 832 (D.C. Cir. 1989), a case involving mail

fraud, likewise struck down an instruction that "ignorance of the law is no excuse," where the defendant claimed a good faith but mistaken belief that she was eligible to claim unemployment benefits. The court found that "if appellant did not harbor the necessary criminal intent, then she is not guilty regardless of whether her mistaken understanding of the law was objectively reasonable." Id. at 835.

The Ninth Circuit in United States v. Petersen, 513 F.2d 1133, 1135 (9th Cir. 1975), similarly found a supplemental instruction in a theft prosecution that "ignorance of the law is no excuse" to be "erroneous, misleading, and contradictory," concluding that "Ignorance of the law is to be considered in determining whether there existed the

specific intent necessary for a violation of the law charged."

While not specifically addressing this precise issue, the First Circuit in United States v. Goodchild, 25 F.3d 55, 59 (1st Cir. 1994), a prosecution for use of unauthorized access devices with the intent to defraud, expressly approved the trial court's instruction that if "the defendant actually believed in good faith that she was acting properly, even if she was mistaken in that belief, and even if others were injured by her conduct, there would be no crime." See also United States v. Aitken, 755 F.2d 188, 194 (1st Cir. 1985) (where entire trial focused on defendant's claim that he actually believed he was not legally obligated to pay taxes, incorrect instruction on intent

undermined jury's standard of judgment on basic issue in case and constituted fundamental error).

In contrast with these circuit courts is the Third Circuit's opinion here, which rests squarely on an explicit holding that a defendant's good faith belief in the lawfulness of his actions is simply not a defense to bankruptcy fraud. Additionally, the Eighth Circuit has expressed doubt as to whether a good faith belief in the lawfulness of one's actions would provide a viable defense to charges of mail fraud, wire fraud, and interstate transportation of stolen goods, where intent to defraud is an essential element of the offenses. See United States v. Costanzo, 4 F.3d 658, 664 n.5 (8th Cir. 1993) (equivocating as to whether a "good

faith belief that diversion was legal were enough to insulate defendant against criminal liability").

The conflict is also evident from, and compounded by, the varying circuit court pattern jury instructions defining "knowingly." Some include a statement that the government need not prove that a defendant knew his actions were unlawful; others, in sharp contrast, expressly warn against attempting any definition of the term "knowingly" in specific intent crimes.

The Ninth Circuit's pattern instruction on "knowingly" includes the sentence that "the Government is not required to prove that the defendant knew that [his][her] acts or omissions were unlawful." Manual of Model Criminal Jury

Instructions for the Ninth Circuit, No. 5.06 (1992). It was this very language that was adopted by the trial court here.

The pattern instructions for the Sixth and Eleventh Circuits, on the other hand, caution against so defining the term "knowingly," particularly in cases requiring a specific intent for convictions. See Pattern Jury Instructions (Criminal Cases) for the Sixth Circuit, No. 2.06 (1991) ("the Committee does not recommend any general instruction defining the term 'knowingly.' Instead, the Committee recommends that the district court define the precise mental state required to convict as part of the court's instructions defining the elements of the offense"); Pattern Jury Instructions of the District Judges

Association of the Eleventh Circuit, Criminal Cases, Basic Instruction No. 9.2 (1985) (knowingly to be defined only in cases "when willfulness or specific intent is not an issue"). See also Federal Judicial Center, Pattern Criminal Jury Instructions (1988), Introduction at pp. iii-iv (avoiding term "knowingly" as a persistent source of ambiguity on requisite state of mind).[8]

---

8 The standard treatise on federal jury instructions, in its definition of "knowingly," also omits the language approved by the Ninth Circuit and the court below. Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions, Civil and Criminal, § 17.04 (1992). See also Pattern Jury Instructions of the Fifth Circuit Judges Association, Criminal Cases, No. 1.35 (1990); Federal Criminal Jury Instructions for the Seventh Circuit, No. 6.04 (1980).

B. The Decision Of The Third Circuit Is Erroneous. A Good Faith Belief In The Lawfulness Of One's Actions Necessarily Negates Specific Intent To Defraud.

To convict a defendant of bankruptcy fraud under 18 U.S.C. § 152, the government must prove that the defendant had an intent to defraud. See, e.g., United States v. Tashjian, 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981); United States v. Martin, 408 F.2d 949 (7th Cir.), cert. denied, 396 U.S. 824 (1969); United States v. Mathies, 350 F.2d 963, 966-67 (3d Cir. 1965) (term "fraudulently" in Section 152 means that government must prove an intent to defraud as an essential element of the offense).

Good faith negates an intent to defraud. See, e.g., United States v. Cavin, 39 F.3d 1299, 1310 (5th Cir. 1994)

("Acquittal is not optional upon a finding of good faith. . .it is mandatory because a finding of good faith precludes a finding of fraudulent intent"); United States v. Casperson, 773 F.2d 216, 223 (8th Cir. 1985) (good faith a complete defense to fraudulent intent element); United States v. Sherer, 653 F.2d 334, 338 (8th Cir.), cert. denied, 454 U.S. 1034 (1981) (good faith precludes conviction of crime requiring fraudulent intent); United States v. Goss, 650 F.2d 1336, 1344-45 (5th Cir. 1981) (good faith is complete defense to intent to defraud under mail fraud statute).

Where a good faith defense is raised, the government must prove beyond a reasonable doubt that the defendant acted with criminal intent and not in good

faith. In re Winship, 397 U.S. 358, 364 (1970) (due process requires proof beyond a reasonable doubt of every element of charged offense); United States v. Goodchild, 25 F.3d 55, 59 (1st Cir. 1994) (approving trial court's instruction in credit card fraud case that the "burden is on the Government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt"); United States v. Bakker, 925 F.2d 728, 738 (4th Cir. 1991) (government has burden of proving specific intent necessary to vitiate good faith defense in mail fraud case).

Here, the Third Circuit ignored the established notion that a defendant's honest belief that the law permitted his actions can negate the mental state required for conviction of a specific

intent crime. Ratzlaf v. United States, 114 S. Ct. at 663 (although ignorance of the law "generally is no defense to a criminal charge," it is a defense to specific intent element of anti-structuring statute, 31 U.S.C. §§ 5322(a) and 5324(3)); United States v. Monteleone, 804 F.2d 1004, 1009 (7th Cir. 1986), cert. denied, 480 U.S. 931 (1987) (ignorance of the law "may be a defense where it negates a mental state that is an element of the charged offense"); United States v. Gross, 961 F.2d 1097, 1102 (3d Cir.), cert. denied, 113 S. Ct. 439 (1992) ("government thus concedes that if [defendant] believed that what he was doing was lawful, he could not have been convicted of" the false statement charges); Model Penal Code § 204(1)

(Proposed Official Draft 1962) (ignorance or mistake of law is defense where it "negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense").

For the same reasons, courts have long recognized a special sort of good faith defense in cases where a defendant seeks and relies upon advice from counsel. As the court explained in United States v. Walters, 913 F.2d 388 (7th Cir. 1990), reversing mail fraud and RICO convictions for failure to give an advice of counsel instruction, such a good faith claim negates fraudulent intent:

> The linchpin of [defendant's] defense was that his actions were taken in good faith based upon the advice of his attorneys. If the jury accepted this characterization of the events, defendant could not have been

> considered to have formed the specific intent necessary to commit fraud upon the universities.

Id. at 391. See also United States v. Eisenstein, 731 F.2d 1540, 1543-1544 (11th Cir. 1984) (defendant charged with failure to file currency transaction reports "can attempt to negate proof of specific intent by establishing the defense of good faith reliance on advice of counsel"); United States v. Bush, 599 F.2d 72, 76-78 (5th Cir. 1979); In re Topper, 229 F.2d 691 (3d Cir. 1956) (good faith reliance on advice of counsel can amount to lack of required fraudulent intent for conviction of bankruptcy fraud).[9] Cf. Devitt, Blackmar, Wolff and O'Malley, Federal Jury

---

9 In its opinion below, the Third Circuit made no attempt to harmonize its gutting of the good faith defense with its previous interpretation of the same statute in Topper.

Practice and Instructions, § 19.08 (4th ed. 1992) ("Action on Advice of Counsel").

Here, although the district court instructed the jury that "good faith" was a complete defense to all counts (719a) and that the burden of disproving "good faith" was on the government (719-720a), it refused to recognize that good faith could be based on a mistaken belief that one was acting lawfully. That failure resulted in an entirely contradictory and thus prejudicial instruction, and further precluded defense counsel from arguing that defendant's mistaken but honest belief in the lawfulness of his actions was a complete defense to the government's charges. These errors were anything but harmless in a case conceded by the

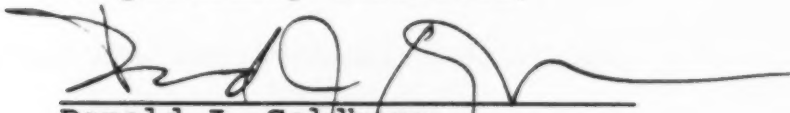
government to be "one of the closer cases on guilt. . .in a fraud setting" (801a).

The Third Circuit, wrongly concluding that a good faith belief in the legality of one's conduct is no defense to bankruptcy fraud, affirmed a conviction obtained in violation of Mervis' constitutional right to a fair trial and due process of law under the Fifth Amendment. As his conviction would not likely withstand appellate review in at least the First, Fifth, Ninth, and District of Columbia Courts of Appeals, this Court should issue its writ of certiorari to review the Third Circuit's judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Donald J. Goldberg
(Counsel of Record)
Creed C. Black, Jr.
Leslie H. Smith
BALLARD SPAHR ANDREWS & INGERSOLL
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Attorneys for Petitioner

Dated: March 8, 1995

APPENDIX A

Filed January 23, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-7477 and 93-7493

UNITED STATES OF AMERICA

v.

DARIUS H. ZEHRBACH,

Appellant in No. 93-7377.

ALEX A. MERVIS,

Appellant in No. 93-7493.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 92-00218-01 and 02)

Argued October 28, 1993
Before: ROTH, LEWIS and GARTH, *Circuit Judges*

Reargued in banc October 17, 1994
Before: Sloviter, *Chief Judge*, Becker,
Stapleton, Mansmann, Greenberg,
Hutchinson, Scirica, Cowen, Nygaard,
Alito, Lewis, Roth, McKee and Garth
Circuit Judges

(Opinion Filed January 23, 1995)

APPENDIX A

David M. Barasch
United States Attorney
Theodore B. Smith, III (Argued)
Assistant United States Attorney
Federal Building, 228 Walnut Street
P.O. Box 11754
Harrisburg, PA 17108
Attorneys for Appellee

James V. Wade, Esquire
Federal Public Defender
Daniel I. Siegel, Esquire (Argued)
Assistant Public Defender
100 Chestnut Street, Suite 306
Harrisburg, PA 17101
Attorneys for Appellant Zehrbach

Donald J. Goldberg, Esquire
(Argued)
Creed C. Black, Jr., Esquire
Ballard Spahr Andrews & Ingersoll
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Attorneys for Appellant Mervis

OPINION OF THE COURT

ROTH, *Circuit Judge*:

Defendants Darius Zehrbach and Alex Mervis appeal from jury verdicts convicting them each of two counts of bankruptcy fraud and one count of conspiracy to commit

bankruptcy fraud, in violation of 18 U.S.C. § 152 (1988) and 18 U.S.C. § 371 (1988). In their appeals, Zehrbach and Mervis asserted two grounds for reversal. First, they argued that the district court erred in instructing the jury that the government need not prove, as an essential element of the crime, that they knew their actions to be illegal. Second, they asserted that comments made by the prosecutor in his closing argument, regarding two of the defense witnesses, triggered a rule of *per se* reversal under *United States v. DiLoreto*, 888 F.2d 996 (3d Cir. 1990). Their appeals were first heard by a panel of this court. On the basis of the panel decision, Zehrbach and Mervis petitioned for rehearing *in banc*, which was granted as to both issues. For the reasons that follow, we will overrule our ruling in

DiLoreto, insofar as it established a *per rule*,[1] and we will affirm the convictions.

I.

In the late summer or fall of 1989, appellant, Darius Zehrbach, a West Virginia businessman doing business under the name of Consolidated Assets Management Corporation ("CAMCORP"), formulated a plan to purchase the assets of bankrupt aircraft manufacturing companies. Zehrbach became particularly interested in Taylorcraft Aviation Corporation ("Taylorcraft"), a company located in Lock Haven, Pennsylvania, that was in the process of Chapter 7 liquidation

---

1 In overruling the *per se* rule announced in *DiLoreto*, we do not, based upon the facts presented in that case, in any way overrule the result reached by the *DiLoreto* court in reversing the convictions.

proceeding.[2] Zehrbach retained the Pittsburgh investment banking firm, Drizos Investments, Inc., to facilitate the acquisition by locating other investors and securing financing.

Appellant, Alex A. Mervis, a stock broker and a licensed pilot, had recently become an employee at Drizos Investments. Because of his aviation background, he was assigned to Zehrbach's project. Steven Drizos supervised Mervis's work on this assignment. Robert Smith of Capital Resources Group, a firm affiliated with Drizos Investments, was brought in to help with financing. Eventually, Mervis located John Polychron, a North Carolina investor,

---

2 Largely because of a failed $458,000 bid to purchase Taylorcraft at a prior bankruptcy auction, the Taylorcraft bankruptcy proceeding had been converted from a Chapter 11 debtor-in-possession proceeding into a Chapter 7 liquidation.

who agreed to become a limited partner in an association in which Zehrbach was to be the general partner.

The bankruptcy trustee for Taylorcraft was Charles Szybist, an attorney in Williamsport, Pennsylvania. Szybist contacted a number of potential bidders in an attempt to generate an offer that would be substantial enough to create a base for aggressive bidding. In September 1989, Szybist received a bid of $155,000 from Leander Research, Manufacturing and Distributing, Inc. ("Leander"). Using this as his base, Szybist notified creditors and other parties in interest of the offer, inviting higher bids to be submitted by October 23, 1989. The notice provided that Leander and all other higher, qualifying bidders would be permitted to participate at

a final private auction to be held on October 30, 1989.

Three new parties, including Zehrbach through CAMCORP, entered bids. T. Chester Baker made a bid of $156,000; Starman Brothers Auctions bid $160,000; and CAMCORP bid $165,000. CAMCORP's bid had been agreed upon at a joint meeting between Zehrbach, Polychron, Drizos, Smith, and Mervis. Because the names of the bidders were released, the Zehrbach group was in a position to contact the other bidders. Zehrbach instructed Mervis to negotiate a "buy-out" of their bidding positions. Baker, for reasons unrelated to the case, lost interest in the acquisition. The other parties remained serious. According to Mervis, he did not hesitate to follow Zehrbach's instructions because Zehrbach was

a bankruptcy expert who "did this all of the time."

Steven Starman, of Starman Brothers Auctions, testified at trial that he would have bid up to "$200,000 plus" for Taylorcraft. Appendix ("App.") at 189. On October 25, Starman received a call from Mervis who asked what it would take to keep Starman out of the bidding process. Starman agreed to withdraw from the bidding for a payment of $40,000, with $10,000 to be paid up-front and the remainder by January 1990. A draft agreement was sent from Mervis's office at Drizos Investments to Starman for his signature and return. The document mischaracterized the nature of the payment as made "[i]n return for services renderd [sic]." Starman also received a form of notice that he was to sign, have notarized, and send to the bankruptcy judge, informing

the bankruptcy court of his withdrawal from the bidding process. Upon receiving these documents, Starman consulted his attorney, David Buelt, a specialist in trusts and estates, who redrafted the agreement to state that Starman Brothers Auctions was being paid to forgo its right to bid at the October 30 sale of Taylorcraft's assets. Steven Starman did not question Buelt about the legality of the agreement but merely expressed concerns about its enforceability. The parties executed the amended agreement, and, once Starman had received the initial $10,000 by wire transfer, he telephone Szybist to inform him that he would no longer be participating in the bidding for Taylorcraft.

Leander Eckard, the president of Leander and the only other potential bidder, testified at trial that he would have been willing to bid up to approximately $250,000

for the purchase of Taylorcraft. App. at 179. Sometime shortly after the October 23 close of bidding, Mervis had contacted Eckard to discuss how much it would cost to purchase his bidding position. Although at first Eckard was not interested, he began to reconsider his position after he encountered difficulty in obtaining financing for the potential acquisition. Eckard's initial request was for a payment of $100,000, but Zehrbach instructed Mervis to negotiate a lower figure. On October 26, Eckard and Mervis agreed on a $50,000 fee with $30,000 payable immediately and the remainder covered by a promissory note and security in one of the Taylorcraft airplanes. Eckard had planned to fly from Seattle, Washington, to visit the Taylorcraft plant the next day, October 27, the last business day before the auction on October 30. He agreed to meet

Mervis at the Pittsburgh airport to finalize the bid buy-out.

To document the agreement with Eckard, Mervis contacted Charles Vollmer, a Pittsburgh attorney. Vollmer had worked with Drizos Investments in the past. Mervis and Vollmer met at 7:30 a.m. on October 27. Vollmer prepared three documents before departing for a 10:00 a.m. appointment. These documents were (1) a Letter of Intent for the limited partnership between Zehrbach and Polychron, which had not yet been formally created; (2) a letter to Polychron on Vollmer's firm letterhead with instructions on making the $30,000 wire transfer to Eckard; and (3) a bid buy-out agreement reflecting the terms of the negotiations between Mervis and Eckard. Like the revised agreement with Starman, the bid buy-out agreement stated that, in exchange

for the payment, Leander "agree[d] to sell to TAC [Taylorcraft Acquisition Corporation, Zehrbach's group] all of its rights . . . [with regard to its bid for Taylorcraft] and, further, agree[d] not to participate either in its own right or through third parties in the bidding process."

At the time he drafted the documents, Vollmer knew very little about the transaction and had not conducted any legal research on the issues. After drafting the bid buy-out agreement, Vollmer expressed his uneasiness about the transaction to Mervis, stating that he "hoped this thing [was] legal."

During the afternoon of October 27, after Vollmer was able to consult two other attorneys and to do some legal research, he faxed a letter to Mervis and Smith explaining:

> Under the terms of the Agreement, Taylorcraft Acquisition Corporation would buy out Leander's "position" in the Bankruptcy Court. Prior to this morning, I had thought that the "position" that was being bought out, if indeed there was one being bought out, was that of a secured creditor. I simply remarked to Alex that, "I hope this [is] legal."

Mr. Vollmer then quoted, verbatim, the language of 18 U.S.C. § 152, the statute under which Zehrbach and Mervis were later charged. Vollmer's letter concluded:

> At this point, I must advise you that in my opinion, there is a possibility that this action violates these criminal provisions. Unless this matter is somehow reworked so that it is not a possible violation, such as a possible joint venture with Leander, I cannot recommend that you participate any further. Please advise.

App. at 61-62.

In the interim, after meeting with Vollmer, Mervis had gone to the airport to meet Eckard. Mervis gave Eckard the buy-out agreement, which Zehrbach had signed, and a

$30,000 certified check. Mervis assured Eckard of the legality of the transaction, stating that his attorney had approved it. Eckard had already called Szybist to inform him that he would not be coming to view the Taylorcraft plant or to place a bid.

Upon Mervis's return to his office that afternoon, he was informed of the Vollmer letter which questioned the legality of the bid buy-out scheme. Vollmer, Mervis, and Smith then held a conference call with Zehrbach to inform him of Vollmer's concerns. Zehrbach dismissed Vollmer's opinion, suggesting that Vollmer did not know what he was talking about. After Drizos and Smith requested a second legal opinion, Zehrbach contacted his West Virginia attorney, James D. Crane, who had bankruptcy experience. Crane affirmed the legality of the transaction, but he characterized it as a

joint venture that had merged bidding interests. Crane was never informed that two bidders had been paid to withdraw their bids.

After both Starman and Leander withdrew from the bidding process just days before the auction was to occur, Szybist called Mervis and spoke of his concern that the other bidders "were having some difficulties." In response, Mervis suggested *not* that there had been payments to withdraw, but rather that "we had formed a joint venture and we had merged our bidding interest." Szybist decided to postpone the auction from October 30 to November 15 and to make it public rather than private. At the auction, the Zehrbach-Polychron group was the only bidder. Szybist accepted its bid of $165,000.

Shortly after the final sale, Szybist contacted the FBI about the circumstances

surrounding the withdrawal of the Starman and Leander bids. After an FBI investigation, Mervis and Zehrbach were indicted, tried, and convicted of one count of conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. § 371,[3] and of two counts of bankruptcy fraud, pertaining to actions with regard to Starman and Eckard, in violation of

---

3 Section 371, conspiracy to commit offense or to defraud United States, provides in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 152.[4] Specifically, Zehrbach and Mervis were charged with conspiring to pay two bidders for the assets of Taylorcraft to refrain from bidding in a bankruptcy auction, with actually paying the bidders to refrain from bidding, and with purchasing the assets as the sole bidders.

Because the defendants did not substantively contest the actions attributed

---

4 Section 152, concealment of assets; false oaths and claims; bribery, provides in part:

> Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage or promise thereof, for acting or forbearing to act in any case under title 11;
>
> . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

to them, the sole issue at trial was that of intent. Mervis and Zehrbach defended themselves on the basis of their good faith belief that they had done nothing illegal. Zehrbach's position, as stated by his counsel, was that Zehrbach had made a mistake, just as the three attorneys involved in the transaction, Buelt, Vollmer, and Szybist, had made a similar mistake, and that Zehrbach could not have had fraudulent intent. Mervis testified that he was working on a joint venture to merge the bidding interests. Mervis also emphasized that Drizos and Smith had supervised his involvement in the project. Mervis's counsel argued that because Mervis was acting in good faith to form a joint venture, he had no intention to deceive. The government contended, on the other hand, that Zehrbach and Mervis knowingly paid the other bidders

to withdraw from the auction, thereby keeping down the price paid for the Taylorcraft assets and, as a consequence, cheating the creditors of Taylorcraft and the bankruptcy trustee.

This question of good faith and knowledge of the law became an issue in the formulation of the jury charge. The district judge proposed first to list the essential elements of the substantive offense and to follow that with a detailed discussion of the requirements that the acts be performed "knowingly" and "fraudulently." He would then, as Zehrbach and Mervis requested, give an instruction on "good faith."

Although Zehrbach and Mervis fully concurred in the scope and content of the

good faith instruction,[5] they challenged a portion of the "knowingly" instruction, in which the court stated that "[t]he government is not required to prove that a defendant knew that his acts were unlawful." When the district judge stated that he was going to leave this sentence in the instructions, counsel for Mervis requested, "May I have argument on *that* just to preserve my objection on the record?" App. at 608 (emphasis added). The district judge replied: "Sure. I know you objected to that." *Id.* Counsel for Zehrbach then argued

---

5 At a pre-charge conference, the district court asked each party for their response to the court's rewrite of the good faith instruction. Mervis' counsel said that it was "satisfactory," and Zehrbach's counsel found it to be "really much better than [the] original good faith defense instruction." App. at 601-02.

that the instruction had "the potential of confusing the jury." Counsel suggested:

> By telling the jurors that the government is not required to prove that the defendant knew his acts were unlawful, the jurors may misconstrue that to mean that it is not relevant that the defendant did not know that his acts were unlawful.

Id. at 609. Counsel asked that the sentence be deleted "in the interest of clarity" because of the potential for confusion and "because the instructions clearly state[d] the burden of the government and [did] not state that [proof of knowledge of illegality] [was] one of the burdens of the government, because it [hadn't] been suggested that this is one of the burdens of the government and because it [would] not be suggested that is one of the burdens of the government . . . ." *Id.*

APPENDIX A

The following excerpt from the jury charge, which fills twenty-six pages of trial transcript in its entirety, places the remark in context. Topic headings have been inserted for the ease of the reader. The instructions were as follows:

[1. The Elements]

In order to meet its burden of proof [on the bankruptcy counts] as to either defendant the government must establish beyond a reasonable doubt each one of the following elements: First, that the defendant gave or offered any money, property, remuneration, compensation, reward, advantage or promise of any of those things to another in exchange for that other person's acting or forbearing to act; second, that the action or forbearance,

in exchange for which the money, property, advantage or promise thereof was given or offered, was in a case under Title 11 of the United States Code, the bankruptcy law; third, that the defendant gave or offered the money, property, advantage or promise thereof knowingly; and fourth, that the defendant did so fraudulently.

[2. "Knowingly]

Now, in order to find a defendant guilty of bankruptcy fraud, therefore you must find beyond a reasonable doubt that the giving or offering of money, property, remuneration, compensation, reward, advantage or promise thereof was done knowingly. An act is done knowingly if it is done voluntarily and intentionally and not because of mistake

or accident or other innocent reason. In other words, an act is done knowingly if the defendant is aware of the act and is not committing the act through ignorance, mistake, or accident. *The government is not required to prove that a defendant knew that his acts were unlawful.*

It is also necessary . . . that you find beyond a reasonable doubt that the defendant knew that his acts were in connection with a bankruptcy proceeding. You may consider evidence of a defendant's words, acts or omissions along with all other evidence in deciding whether a defendant acted knowingly.

APPENDIX A

[3. "Fraudulently"]

Also, . . . you must . . . find beyond a reasonable doubt that the giving or offering of money, property, remuneration, compensation, reward, advantage or promise thereof was done fraudulently. In a bankruptcy case, an act is done fraudulently if it is done with the intent to defraud the creditors of the bankrupt entity or with the intent to defraud the United States or the trustee in bankruptcy concerning their right and government function of regulating bankruptcies and fairly distributing the assets of the bankrupt entity.

Now, to act with fraudulent intent . . . means to act knowingly and with the specific intent to deceive, ordinarily for the purpose [of] either

causing some financial loss to another or bringing about some financial gain to one's self [sic].

Now, intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer a defendant's intent from the surrounding circumstances. You may consider any statements made and done or omitted by a defendant and all other facts and circumstances in evidence which indicate his state of mind.

To act with a fraudulent intent a person must act knowingly and with the intention or the purpose to deceive or to cheat, in this case either to deceive or to cheat the creditors of Taylorcraft Aviation Corporation or the bankruptcy trustee.

[Passage distinguishing intent and motive omitted.]

[4. "Good Faith"]

Now, a defendant may contend that he did not act with the specific intent to commit the crimes with which he is charged since he acted in good faith. A good faith is a complete defense to charges of acting with fraudulent intent because good faith is simply inconsistent with the intent to defraud. A person acts with fraudulent intent and without good faith when he acts with a purpose to deceive or to cheat, and so as to deprive another person of a right or property. While the term good faith has no precise definition, it means, among other things, an absence of an

intention of taking advantage of another.

The burden of proving that a defendant did not act in good faith is on the government. In determining whether a defendant acted in good faith you should consider all of the evidence in the case bearing on that defendant's state of mind.

If the evidence leaves you with a reasonable doubt as to whether a defendant acted with the intent to defraud, or in good faith, you must acquit him. On the other hand, if you find that the government has proven beyond a reasonable doubt all of the other elements of the charged crimes and that a defendant did not act in good faith, then you should find that defendant guilty.

(Emphasis added).

At the conclusion of the reading of the jury charge, defense counsel renewed their objections to the instruction that the government was not required to prove that a defendant knew his acts were illegal. App. at 726.

Zehrbach and Mervis also objected during closing argument to comments that the prosecutor made in regard to Drizos and Smith, whom the defense had called as witnesses to support Mervis's testimony that he believed he was creating a legal joint venture to acquire Taylorcraft. In his closing argument, the prosecutor suggested that neither Drizos nor Smith was "worthy of belief," citing testimony which cast doubt on their credibility. Specifically, the prosecutor pointed to Drizos's failure to inform Polychron that an attorney had advised

Drizos to refrain from further action in connection with the buyouts. He similarly noted Drizos's failure to ensure that his employee (Mervis) stop his involvement in potentially illegal activity. The prosecutor also cited the inconsistencies between what Smith had told the FBI and Smith's testimony in court. The prosecutor then commented:

> I suggest you shouldn't believe Drizos and Smith because they're guilty of exactly the same bankruptcy fraud that these two defendants are guilty of. And don't you assume that they are not going to get what's coming to them either.

Both defense counsel immediately objected to this statement. The district judge granted their motion to strike. He cautioned the jury to "disregard the last statement of the prosecutor with respect to what may or may not happen with respect to these two gentlemen." Moreover, the judge subsequently instructed the members of the

jury to disregard counsel's personal opinions and to make decisions based solely on the evidence. He then reminded the jury not to consider any evidence that he had instructed them to disregard in the course of the proceedings.

Defense counsel later moved for a mistrial on the ground that the second comment was irrelevant and was based upon information outside the record. The district court denied the motion, citing its curative instructions and questioning whether the statement "could have resulted . . . in any serious prejudice to either defendant." Similarly, in denying Zehrbach's motion for a new trial, the district court held that the first sentence of the statement was properly based on evidence of the witnesses' own guilt that had been adduced at trial and that any improper inference that might have been

induced by the second sentence had been cured by the court's instructions. *United States v. Zehrbach*, No. 92-0218, mem. op. at 8-9 (M.D. Pa. Jul. 7, 1993).

Following the jury verdict, the district judge sentenced Zehrbach to a term of imprisonment of 21 months, followed by three years of supervised release, and sentenced Mervis to 10 months of imprisonment, followed by two years of supervised release. Zehrbach and Mervis base their appeal on the two issues of the jury instructions and of the prosecutor's remarks in closing argument.

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 (1988), and this court is vested with appellate jurisdiction pursuant to 28 U.S.C. § 1291 (1988).

APPENDIX A

II. THE JURY CHARGE

A.

Zehrbach and Mervis objected to the trial judge's instruction that "the government is not required to prove that a defendant knew that his acts were unlawful" on the grounds, expressed by counsel, that it had "the potential of confusing the jury." Defense counsel suggested that "[b]y telling the jurors that the government is not required to prove that the defendant knew his acts were unlawful, the jurors may misconstrue that to mean that it is not relevant that the defendant did not know his acts were unlawful." Although neither Zehrbach or Mervis's attorney proposed any clarifying language, they asked that the sentence be dropped "in the interest of clarity."

APPENDIX A

The extent of the grounds for defense counsels' objection to the challenged instruction are not entirely clear from the record. The objection could be construed as a challenge to the trial court's inclusion of the instruction as a matter of law. Alternatively, the objection could be read as a challenge merely to the confusing nature of the instruction. The basis of the objection determines the appropriate standard of review. We will consider the issue first as a review of the legal propriety of the instructions. In this light, if the objection is construed as a challenge to the court's statement of the legal standard, we exercise plenary review, *United States v. McGill*, 964 F.2d 222, 235 (3d Cir. 1992); *Savarese v. Agriss*, 883 F.2d 1194, 1202 (3d Cir. 1989). In connection with a review of the legal sufficiency of the instructions,

however, if we were to determine that counsel had not objected at trial to the court's statement of the legal standard, we would review the legal propriety of the instructions on a "plain error" standard.[6] Whether we exercise plenary review or apply the plain error standard, however, we conclude that the court did not err in stating the relevant legal principles.

---

6 Where a party has not made a clear, specific objection to the charge that he alleges is erroneous at trial, he waives the issue on appeal "unless the error was so fundamental and highly prejudicial as to constitute plain error." *Bennis v. Gable*, 823 F.2d 723, 727 (3d Cir. 1987) (internal quotation omitted); see also *United States v. Santos*, 932 F.2d 244, 250-53 (3d Cir.) (examining the court's failure to define the burden of proof applicable to a duress defense for plain error where the party objected to the court's failure to give the defendant's proposed duress instruction), *cert. denied* 112 S. Ct. 592 (1991); *United States v. Castro*, 776 F.2d 1118, 1128-30 (3d Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986).

APPENDIX A

Zehrbach and Mervis concede that the jury charge correctly stated the government's burden of proof. The jury instruction did not omit any of the four essential elements of bankruptcy fraud. The trial judge properly instructed the jury that the government was required to establish beyond a reasonable doubt:

> First, that the defendant gave or offered any money, property, remuneration, compensation, reward, advantage or promise of any of those things to another in exchange for that other person's acting or forbearing to act; second, that the action or forbearance, in exchange for which the money, property, advantage or promise thereof was given or offered, was in a case under Title 11 of the United States Code, the bankruptcy law; third, that the defendant gave or offered the money, property, advantage or promise thereof knowingly; and fourth, that the defendant did so fraudulently.

App. at 716.

Zehrbach and Mervis do not argue that the elements of bankruptcy fraud were

improperly set out. They contend, however, that the challenged instruction, contained in the court's further explanation of the element "knowingly," contradicted the court's good faith instruction. As set out *infra*, the trial judge had instructed the jury that good faith is a complete defense to bankruptcy fraud and that the government must prove that a defendant did not act in good faith. Zehrbach and Mervis made the good faith charge relevant by their claim that they were involved, not in an attempt to silence competing bidders, but merely in a joint venture with Starman and Leander to acquire Taylorcraft.

Our first consideration in reviewing defendants' argument is whether a good faith defense was necessary in view of the description of the elements of bankruptcy fraud which the district court gave to the

jury. If the jury found beyond a reasonable doubt that, by paying competitors not to bid in the auction, Zehrbach and Mervis acted with fraudulent intent to deceive or to cheat the creditors of Taylorcraft Aviation Corporation or the bankruptcy trustee, it would be inconsistent with this conclusion for the jury also to find that Zehrbach and Mervis had acted with good faith. When a jury has determined that an accused has intended to cheat his victim, the possibility that the accused also acted in good faith has been eliminated.

Because the trial judge had delivered detailed instructions regarding the elements of bankruptcy fraud, and in particular regarding the element of acting with fraudulent intent, the good faith instruction became in fact superfluous. The good faith instruction merely reiterated that the

government carried the burden of demonstrating that the defendants did act with the requisite fraudulent intent.

Moreover, as Zehrbach and Mervis acknowledge, proof of knowledge of illegality is not a burden of the government in a bankruptcy fraud case. The statutory requirement that the underlying acts be performed "knowingly" requires only that the act be voluntary and intentional and not that a person knows that he is breaking the law. *See Cheek v. United States*, 498 U.S. 192, 199 (1991) (stating that as a general rule, the government is not required to prove the criminal defendant's knowledge of the illegality of his actions); *United States v. Brown*, 862 F.2d 1033, 1038 n.5 (3d Cir. 1988).

The instant case differs from those cases involving criminal offenses for which

proof of knowledge of illegality is an element of the government's prima facie case. In such cases, mistake of law is a complete defense. For instance, the Supreme Court recently held that the "willfulness" element of the anti-structuring provision of the financial transaction reporting requirements, contained in 31 U.S.C. §§ 5322(a) & 5324, requires proof of knowledge of illegality. *See Ratzlaf v. United States*, 114 S.Ct. 655, 658 (1994). The Court based its holding upon a strict reading of the statutory language of the two sections. Sections 5324 provides that it is illegal to "structure" financial transactions "for the purpose of evading" a financial institution's reporting requirements. Section 5322(a) establishes that "a person willfully violating" the antistructuring provisions (§ 5324) is subject to criminal penalties. The Court

found that failure to read knowledge of illegality into a violation prosecuted under § 5322 would - in light of § 5324's purposefulness requirement - treat "§5322(a)'s 'willfulness' requirement essentially as surplusage." *Id.* at 659-60. In concluding, the Court stated that it did not "dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge" and emphasized that its decision was particular to the plain meaning of the statute then before it.[7] *Id.* at 663.

---

7 Since *Ratzlaf* was decided, Congress has amended § 5324 so that it contains its own criminal penalty provision, making resort to § 5322(a) unnecessary. The amended provision does not refer to a mental state but declares that "[w]hoever violates this section shall be fined in accordance with title 18, United States Code, imprisoned for not more than 5 years, or both." 1994 Riegle Community Development and Regulation Improvement Act, Pub. L. No. 103-325 § 411, 108 Stat. 2253 (1994).

(continued...)

See also Staples v. United States, 114 S.Ct. 1793, 1804 (1994) (government required to prove defendant knew of the features of his semiautomatic firearm which brought it within the scope of the National Firearms Act, requiring registration to fully automatic weapons); *United States v. Curran*, 20 F.3d 560, 568-69 (3d Cir. 1994) (applying the *Ratzlaf* willfulness standard by analogy where the prosecution alleged a violation of the disclosure obligations imposed under Election Campaign Act); *United States v. Gross*, 961 F.2d at 1102 (noting that belief in legality is a complete defense to the crime of making false statements to the Securities and

---

7(...continued)
Because the provision no longer incorporates the willfulness requirement of § 5322(a), the only mental state that the Government must prove in prosecutions for structuring is the purpose of having a financial institution not file a required report.

Exchange Commission where the parties stipulated that the Government had the burden of showing that the defendant acted with knowledge of the wrongfulness of his actions).

We conclude, in light of the elements making up the offense of bankruptcy fraud, particularly the element of intent to defraud the creditors or the trustee of the bankruptcy estate, that a defendant's good faith belief in the lawfulness of his conduct is not a defense to bankruptcy fraud. In a case like the present one, where the defendants have claimed they were attempting to set up a joint venture, a belief that acquisition of Taylorcraft through a joint venture was proper would be relevant for the jury to consider in determining if there was intent to defraud. However, the element of "knowledge of illegality" which is required

in federal criminal tax offenses, *see Cheek*, 498 U.S. at 192, or in the violation of election disclosure obligations, *see Curran*, 20 F.3d at 569, is not a required element of bankruptcy fraud. Therefore, proof by a defendant of lack of knowledge of illegality cannot in and of itself defeat a conviction for bankruptcy fraud.[8]

In challenging the legal sufficiency of the charge on knowledge of illegality, Zehrbach and Mervis also argue that the

---

8 For this reason, we do not find error in the district court's ruling, if the court in fact did so rule, that defense counsel could not argue that good faith is a defense if there is a mistake as to the law, *see* App. at 607-08, so long as the element of intent to defraud had to be proved by the government beyond a reasonable doubt and so long as the jury could consider the defendant's state of mind in making its determination on intent to defraud. It is because we find that these latter two requirements were met in this case that we do not find such a ruling would have been erroneous.

inclusion of the statement unconstitutionally shifted the burden of proof or precluded the jury from considering proper exculpatory information. They rely primarily on two cases, *United States v. Rhone*, 864 F.2d 832 (D.C. Cir. 1989) and *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977), both of which we find to be distinguishable.

In *Rhone*, the defendant appealed her conviction for mail fraud and theft arising out of her continued receipt of unemployment benefits after she had become employed full time. As in the instant case, the government had the burden of establishing specific intent to defraud, and the defendant's sole defense was that she lacked the requisite intent, *i.e.*, that she didn't believe her employment qualified as "full time" employment. At the close of the case, the trial court gave a standard jury instruction

on specific intent to defraud but ended the instruction with the following statement: "And I should point out at this time that ignorance of the law is no excuse." *United States v. Rhone*, 864 F.2d at 834.

Suggesting that the quoted instruction eased the government's burden of proving specific intent beyond a reasonable doubt or at least "confused the jury on the very central issue of intent," the D.C. Circuit found that the statement created constitutional error requiring a new trial. *Id.* at 836-37. The court concluded that

> [t]he jury . . . could well have inferred that the prosecution had met its burden of proving specific intent beyond a reasonable doubt simply on the basis that appellant was presumed to know the law and that she therefore knowingly committed fraud and theft.

Id. at 837.

We believe that the instruction in *Rhone* went far beyond the instruction given in this

case. That instruction effectively told the jury that ignorance of the law is irrelevant, suggesting – incorrectly – that the jury should not even consider the defendant's lack of knowledge of the law regarding her legal entitlement to unemployment benefits. In the instant case, the court merely instructed the jury that the government was not required to prove that the defendants knew their actions to be illegal. This instruction correctly stated the government's burden of proof in this case and in addition was made pursuant to a charge in which the district court instructed the jury no less than three times, once each in connection with the defense of "good faith" and the elements of "knowingly" and "fraudulently," that they "should consider all of the evidence in the case bearing on that defendant's state of mind."

APPENDIX A

Schilleci involved the appeal of a conviction for conspiring to intercept wire and oral communications, in violation of 18 U.S.C. § 2511. This offense is a crime of specific intent and has been held to require an intentional or reckless disregard of legal obligations. *See Malouche v. JH Management Co., Inc.*, 839 F.2d 1024, 1025 (4th Cir. 1988) (§ 2511 was intended "to denote at least a voluntary, intentional violation of, and perhaps also a reckless disregard of, a known legal duty", citing *Citron v. Citron*, 722 F.2d 14, 16 (2d Cir. 1983) *cert. denied*, 466 U.S. 973 (1984)). For this reason we do not find that the Fifth Circuit's reasoning in *Schilleci* is helpful to our consideration of an offense, like bankruptcy fraud, where the government must prove intent to cheat or defraud but where there is not a duty for the

government to prove that the defendant knew his acts were illegal.

Contrary to the arguments of Zehrbach and Mervis, we find that the charge in the instant case fairly and adequately submitted the issues to the jury for determination. The charge accurately stated the government's burden of proof. It did not preclude consideration of defendants' claim that they thought they were putting together a joint venture and that they did not know that what they were doing was illegal. Importantly, the challenged instruction did not shift the government's burden of proving fraudulent intent. At the same time, however, it did not preclude the jury from considering exculpatory information which Zehrbach and Mervis introduced in an effort to establish their defense. Rather, the instruction merely explained that proof of knowledge of

illegality was not a burden of the government's case in chief. We conclude that the court did not err as a matter of law in setting forth the legal standards governing the jury's consideration.

Moreover, since we have found that the legal standard of the charge survived plenary review on the supposition that a proper objection was made to the jury instructions, if we should instead determine that defense counsel failed to object to the legal propriety of the inclusion of the "the government is not required to prove that a defendant knew that his acts were unlawful" language in the jury instructions, clearly the giving of this charge does not constitute plain error.[9]

---

9 This court has defined "plain error" as "those errors that seriously affect the fairness, integrity or public reputation (continued...)

APPENDIX A

Whether or not defense counsel preserved an objection to the legal sufficiency of the charge, counsel clearly objected to the charge on the ground that it was potentially confusing to the jury. In reviewing jury instructions, we review the trial court's expression for abuse of discretion. *Savarese v. Agriss*, 883 F.2d at 1194; *United States v. Messerlian*, 832 F.2d 778, 789 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988). We must consider "whether, viewed in light of the evidence, the charge as a whole fairly and adequately submits the issues in the case to the jury." *Bennis v. Gable*, 823 F.2d at 727.

9(...continued)
of judicial proceedings." *United States v. Santos*, 932 F.2d at 250 (internal quotation omitted). The doctrine is applied "'sparingly' . . . and only where the error was sure to have had an 'unfair prejudicial impact on the jury's deliberations.'" *Id.* (citation omitted).

We must reverse if "the instruction was capable of confusing and thereby misleading the jury." *Bennis v. Gable*, 823 F.2d at 727 (citing *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1183 (1984)); *United States v. Goldblatt*, 813 F.2d 619, 623 (3d Cir. 1987).

Examining the jury charge as a whole, we cannot agree with Zehrbach and Mervis that the challenged instruction was cable of confusing the jury, even in relation to the good faith instruction. Notably, the good faith instruction came after the instructions on "knowingly" and "fraudulently," serving as a general statement on the absence or existence of the required intent. The court explained that good faith is an absolute defense, that "all evidence bearing on [the] defendant's state of mind" should be considered, and that the jury must acquit if they had a reasonable doubt about the

existence of intent or good faith. Given this language, it is unlikely that the jury mistakenly did not consider Mervis and Zehrbach's alleged belief in the legality of their actions when the jury was deliberating on the question of whether the government had proved fraudulent intent beyond a reasonable doubt.

As a more general matter, the court continuously reinforced the notions that the burden of proof in a criminal case is always upon the government; that the defendants are protected by a presumption of innocence; and that, unless they are proven guilty beyond a reasonable doubt, the defendants must be acquitted. The court repeated these principles at least six times during the course of its final instructions to the jury. In addition, the court instructed the jury to "consider the charge as a whole," rather than

"singl[ing] out any one instruction." This reinforces our belief that the jury would not have been mislead by the single instruction that the government need not prove knowledge of illegality.

Moreover, when defense counsel first challenged the instruction, the court explained that it felt that the instruction was necessary in order to clarify precisely what "knowledge" is required of a defendant who acts "knowingly" in the commission of bankruptcy fraud. That decision was clearly committed to the discretion of the district court. Here, Zehrbach and Mervis did not challenge the content of the good faith instruction, nor did they propose the inclusion of a sentence clarifying the relationship between their claimed ignorance of the law and their good faith defense. They simply challenged the inclusion of

language which in fact correctly commented on an element that the government did not need to prove. Therefore, because we believe that the jury charge, taken as a whole, was not misleading or confusing to the jury, we find no abuse of discretion.

III. THE PROSECUTOR'S REMARKS.

A.

We turn next to Zehrbach and Mervis' argument that the prosecutor prejudiced their right to a fair trial when he stated in his closing argument:

> I suggest you shouldn't believe Drizos and Smith because they're guilty of exactly the same bankruptcy fraud that these two defendants are guilty of. And don't you assume that they are not going to get what's coming to them either.

Zehrbach and Mervis urge that these remarks comment on the credibility of Drizos and Smith, based on facts not in the record, and are therefore *per se* grounds for a new trial

under *DiLoreto*, 888 F.2d at 996. For the reasons stated below, we will overrule the *per se* rule of *DiLoreto*. Rather than using the *DiLoreto per se rule*, we will analyze this case on its own facts. In making this analysis, because we must conclude that the prosecutor's remarks were improper, we will go on to weigh the remarks under a harmless error standard. *See United States v. Young*, 470 U.S. 1, 11-12 (1985).

B.

Prosecutorial misconduct does not always warrant the granting of a mistrial. The Supreme Court has acknowledged that given "the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *United States v. Hasting*, 461 U.S.

499, 508-09 (1983). Thus, the Supreme Court has held that an appellate court should not exercise its "[s]upervisory power to reverse a conviction . . . when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." *Id.* at 506.

The harmless error doctrine requires that the court consider an error in light of the record as a whole, but the standard of review in determining whether an error is harmless depends on whether the error was constitutional or non-constitutional. In this instance, the alleged error, attacking the credibility of a witness with evidence not in the record, is non-constitutional. We have held that non-constitutional error is harmless when "it is *highly probable* that the error did not contribute to the judgment."

Government of Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir. 1976). "High probability" requires that the court possess a "sure conviction that the error did not prejudice" the defendant. *United States v. Jannotti*, 729 F.2d 213, 219-20 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984). Therefore, we will reverse if we conclude that the prosecutor's remarks, taken in the context of the trial as a whole, prejudiced the defendants.

In determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's

conviction.[10] As the Supreme Court has emphasized "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context." *United States v. Young*, 470 U.S. at 11 (finding harmless error where the prosecutor had stated his opinion that the defendant was guilty and urged the jury to "do its job").

C.

The first sentence of the prosecutor's objectionable remarks suggested that the jury should not believe Drizos and Smith because

---

10 *See United States v. Gambino*, 926 F.2d at 1355, 1365 (3d Cir.), *cert. denied sub nom. Mannino v. United States*, 501 U.S. 1206 (1991); *United States v. DiPasquale*, 740 F.2d 1282 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); *United States v. Homer*, 545 F.2d 864, 867-68 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

they were also guilty of the crimes of which the defendants were guilty. This statement was clearly improper to the extent that it reflected the prosecutor's opinion concerning the guilt of Mervis and Zehrbach. As the Supreme Court has held, when a prosecutor expresses his personal opinion concerning the guilt of the accused, he creates two risks:

> such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. at 18-19.

In addition, the statement was improper as an expression of the prosecutor's personal belief regarding the guilt of the two

witnesses themselves.[11] As the district court held, however, "[i]t is not impermissible to argue the conclusion that witnesses other than the accused are guilty of a crime when evidence of such has been produced." *United States v. Zehrbach*, No.

---

11 Although counsel may state his views of what the evidence shows and the inferences and conclusions that the evidence supports, it is clearly improper to introduce information based on personal belief or knowledge. Standard 3-5.8(b) of the American Bar Association Standards for Criminal Justice provides:

> It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

See also ABA Model Rules of Professional Conduct, Rule 3.4(e) (stating that a lawyer shall not "in trial . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused").

92-0218, mem. op. at 8. Evidence regarding Drizos and Smith's decision making and supervision of the bid buy-out scheme, including testimony by both witnesses as to their active participation, supported the prosecutor's challenged remark, prompting the district court to conclude that the remark was "based on evidence adduced at trial." *Id.* Nonetheless, to the extent that the sentence was an expression of the prosecutor's personal belief, it was inappropriate and is subject to review for prejudicial effect, as is the second sentence of the prosecutor's remarks.

The second sentence, which entreated the jury not to assume that Drizos and Smith were "not going to get what's coming to them," was improper and irrelevant, because it referred to information outside of the record and sought to influence the decision of the jury

on an illegitimate basis. This Court has long acknowledged a defendant's "right to have his guilt or innocence determined by the evidence presented against him, not by what has happened" - or by what may happen - "with regard to a criminal prosecution against someone else." *United States v. Thomas*, 998 F.2d 1202, 1207 (3d Cir. 1993) (quoting *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949)).[12]

---

12 Likewise, standard 3-5.8(d) of the American Bar Association Standards for Criminal Justice explains:

> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law . . . .

Standard 3-5.9 further advises:

> It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record.

APPENDIX A

As the district court concluded in denying Zehrbach's motion for a new trial, the prosecutor may have made the remark "to keep the jury from reaching a verdict on an improper basis, *i.e.* that all of the guilty parties had not been brought to justice, and only the defendants then on trial had been singled out for prosecution." *United States v. Zehrbach*, No. 92-0218, mem. op. at 8-9. The court's conclusion was consistent with the grounds that counsel for Zehrbach originally stated to support his motion for a mistrial. Nonetheless, the remark effectively encouraged the jury to reach a guilty verdict on irrelevant and illegitimate grounds.

Furthermore, given that the prosecutor made the statement in question immediately after telling the jury that the witnesses should not be believed because they were

themselves guilty, the comment could also be construed as a comment on the witnesses' credibility. Thus, Zehrbach and Mervis argued that this court's holding in *United States v. DiLoreto*, 888 F.2d at 996, required reversal *per se*.

In *DiLoreto*, the defendants objected to the prosecutor's comments in closing argument regarding the credibility of the defendants' accomplices, who testified for the Government after entering into plea agreements themselves. The prosecutor stated: "We don't take liars. We don't put liars on the stand. We don't do that." *DiLoreto*, 888 F.2d at 998. Although the defendants characterized the comments as "improper prosecutorial vouching depriving them of a fair trial," the district court denied both their motions for mistrial and their subsequent request for curative instruction.

On appeal, this court vacated and remanded, holding that "a prosecutor's remarks regarding the defendant's guilt or a witness' credibility, if based on information not adduced at trial, require reversal *per se*." *Id.* at 999.

The *per se* reversal standard announced in *DiLoreto*, however, conflicts with Supreme Court case law requiring the court to analyze prosecutorial comments case by case, in the context of the entire trial, and to reverse only where the defendant has suffered prejudice. *United States v. Young*, 470 U.S. at 111-12. Therefore, we expressly overrule *DiLoreto* insofar as it established a *per se*, rather than a case by case, rule. We will, therefore, analyze the prosecutor's remark pursuant to the harmless error doctrine. In light of that analysis, we conclude that both comments, though truly improper and

unfortunate, do not constitute reversible error.

D.

Although it is true that irreparable harm may be inflicted in a moment, the comments at issue were but two sentences in a closing argument that filled forty pages of transcript. Immediately after the objection, the court gave a specific instruction to disregard the prosecutor's comment, an instruction that the court repeated just a short time later at the close of the prosecutor's argument. As a general matter, the court told the jurors to disregard any personal opinion of counsel and to base their decision solely on the evidence. And, in its final instructions, the court cautioned the jury members that the arguments of counsel are not evidence; that they must not be

persuaded by bias, prejudice, or sympathy; and that they must not consider any evidence that they were earlier instructed to disregard. We believe that this extensive cautioning by the court was sufficient to cure the prosecutor's error.

Furthermore, the extensive evidence of Zehrbach and Mervis's intent to defraud supports our conclusion that the prosecutor's remarks would not have prejudiced the jury's deliberations. The evidence clearly supports the government's burden of proving that Zehrbach and Mervis knowingly and fraudulently paid other bidders to refrain from bidding for assets in a bankruptcy auction.

Zehrbach and Mervis acted in blatant disregard of questions about the legality of their actions, and they repeatedly mischaracterized the transaction. In

response to Polychron's inquiry as to whether the buy-outs were "kosher," Mervis promised to obtain an opinion letter from an attorney approving the transaction. Mervis failed to produce such a letter. Moreover, when Attorney Vollmer sent an unsolicited letter quoting the relevant criminal statute and strongly advising against further participation in the bid buy-out scheme, Mervis and Zehrbach chose to disregard it. Zehrbach made some effort to obtain another opinion, from Attorney Crane, to assuage concerns. But Crane's positive opinion affirming the legality of "the transaction" rested on a misrepresentation of the transaction as a joint-venture rather than a bid buy-out. In fact, in seeking Crane's legal opinion, no one had mentioned to him the payments made to Starman and Eckard to refrain from bidding. Mervis was similarly

selective in his discussions with the bankruptcy trustee and the FBI, referring to the transaction as a "merger of interests" or a "joint-venture" and remaining silent about the payments.

We find the evidence of knowledge and of deception to be substantial. Under these circumstances and given the court's curative instructions, we find that the remarks of the prosecutor constitute harmless error.

IV.

For the foregoing reasons, we will affirm the judgments of conviction of the district court.

LEWIS, *Circuit Judge*, dissenting.

I join in Parts I and II of the majority opinion, and in Part III insofar as it overrules the *per se* rule of *DiLoreto*. However, I cannot join in Part III of the

opinion to the extent it concludes that the error here was harmless.

It is difficult for me to imagine a statement which would carry a more powerful impact upon a jury, or which would be more likely to deter it from acquitting, than to imply in no uncertain terms that the defendants' two chief witnesses were going to be indicted for their participation with the defendants in the underlying criminal activity. That is exactly what happened here. The prosecutor's statement was tantamount to telling the jury that the defendants' two main witnesses were *in fact* as guilty as the defendants were and would themselves be brought to answer criminal charges, despite the fact that there was no evidence to suggest that these individuals were going to be indicted and despite the

more compelling fact that they never were indicted.

The majority acknowledges that "the remark effectively encouraged the jury to reach a guilty verdict on irrelevant and illegitimate grounds." Maj. Op. Typescript at 26. How, then, can we be confident that "it is *highly probable* that the error did not contribute to the judgment"? *See* Maj. Op. Typescript at 23, citing *Govt. of Virgin Islands v. Toto*, 529 F.2d 278, 274 (3d Cir. 1976). "Highly probable" requires us to be virtually certain, as that standard is only satisfied when we hold a "sure conviction that the error did not prejudice" the defendant. *See* Maj. Op. Typescript at 23, citing *United States v. Jannotti*, 729 F.2d 213, 219-20 (3d Cir.), *cert. denied* 469 U.S. 880 (1984). The majority acknowledges this also, but then shifts its focus from the

impact of the remarks to the prosecutor's *motive* in uttering them. I believe this diversion to be the fundamental flaw in the majority's analysis. Since we must be convinced that a criminal defendant was not prejudiced for harmless error to apply, what difference does it make to that inquiry that the prosecutor might have meant something else in uttering the offending remarks? It is not what the prosecutor meant that should control, but rather the effect of what he said upon the defendants' right to be judged by an untainted jury. Our focus should be to determine that it is almost certain that the error did not contribute to the conviction. In my view, the majority does not place sufficient emphasis upon this critical inquiry.

And it is precisely for this reason that I believe the majority fails to perceive the

violence which remarks such as those at issue are capable of inflicting upon the unfettered fact-finding and truth-seeking mission of the jury, preferring instead to rely upon the court's cautionary instructions and the quantum of evidence *properly* before the jury which pointed toward guilt. As I stated in my original dissent, "I cannot imagine any curative instruction that would be sufficient to purge the jury of the powerful impact of such an improper, unfounded assertion by the prosecutor." *United States v. Zehrbach*, Nos. 93-7477 and 93-7493 at 8 (Lewis, J. dissenting). I believe this is particularly true in view of the fact that to a considerable degree, the defendants' convictions rested upon the jury's assessment of the credibility of Drizos and Smith. Moreover, I am not persuaded that the jury could not have been influenced by these

improper remarks, to the prejudice of the defendants, regardless of the weight of additional evidence demonstrating their guilt.

For these reasons, I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-7477 and 93-7493

UNITED STATES OF AMERICA

vs.

DARUS H. ZEHRBACH,

Appellant in No. 93-7477.

ALEX A. MERVIS,

Appellant in No. 93-7493.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Criminal Nos. 92-00218-01 and 02)

ARGUED OCTOBER 28, 1993
BEFORE: ROTH, LEWIS and GARTH,
Circuit Judges.

REARGUED IN BANC OCTOBER 17, 1994
BEFORE: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, LEWIS,
McKEE and GARTH
Circuit Judges.

APPENDIX B

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the Slip Opinion filed in this case on January 23, 1995, be amended as follows:

The dissent by Judge Lewis is amended to show that Judges Mansmann, Nygaard and McKee join in that dissent.

BY THE COURT

Timothy K. Lewis /s/
Circuit Judge

Dated: January 23, 1995

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-7477 and 93-7493

UNITED STATES OF AMERICA

v.

DARUS H. ZEHRBACH,

Appellant in No. 93-7477

ALEX A. MERVIS,

Appellant in No. 93-8403

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 92-00218-01 and 02)

Present: Sloviter, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Lewis, Roth, McKee and Garth
Circuit Judges

APPENDIX C

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel October 28, 1993, and reargued before the Court in banc October 17, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered July 15, 1993, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sisk /s/
Clerk

Dated: January 23, 1995

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:
	:No.1:CR-92-0128-02
v.	:JUDGE McCLURE
ALEX A. MERVIS	:

ORDER

August 5, 1993

BACKGROUND

On February 24, 1993, defendant Alex A. Mervis was found guilty by a jury of two counts of bankruptcy fraud and one count of conspiracy to commit bankruptcy fraud. He was sentenced by this court to a term of incarceration of 7 months, to be followed by 3 months of home detention.

Before the court is a motion by defendant for bail pending appeal.

APPENDIX D

DISCUSSION:

I. STANDARD FOR RELEASE PENDING APPEAL

Release pending appeal is governed by 18 U.S.C. § 3143(b), which reads,

> (b) Release or detention pending appeal by the defendant. -- (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds --
>
> > (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
> >
> > (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in --
> >
> > > (i) reversal,
> > > (ii) an order for a new trial,
> > > (iii) a sentence that does not include a term of imprisonment, or

> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, . . .

In other words, § 3143(b) states that, when a defendant has been sentenced to a term of imprisonment, the court shall order the defendant detained pending appeal unless the court makes findings that certain conditions exist. In this case, those conditions are:

(1) by clear and convincing evidence, defendant is not likely to flee or pose a danger to the safety of any other person or the community if released;

(2) the appeal is not for the purpose of delay;

(3) the appeal raises a substantial question of law or fact; and,

(4) if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed. See United States v. Messerlian, 793 F.2d 94, 95-96 (3d Cir. 1986).

The government does not contend that defendant is likely to flee or that he poses a danger to others, nor that the appeal is frivolous or for the purpose of delay, so that the only issues regarding this motion are whether the appeal raises a substantial question and whether a finding of error by the Court of Appeals is likely to result in a reversal of the conviction and/or an order for a new trial.

APPENDIX D

"Substantial" in the context of § 3143 means that the issue is "one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful." United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985). An issue which is substantial is more than one which is merely not frivolous. Id. Error is "likely to result" in a reversal or a new trial when such error would not be considered harmless by the Court of Appeals if determined in the appellant's favor. Id.

The sole issue raised by defendant is whether defendant was deprived of a fair trial by the court's instruction to the jury that the government was not required to prove that defendant knew that his actions were illegal. We have previously addressed this issue, and denied co-defendant Darus

Zehrbach's motion for release pending appeal because the issue is not "substantial" under § 3143.

It is axiomatic that "ignorance of the law is no defense to purposeful and intentional action." United States v. Gregg, 612 F.2d 43, 51 (2d Cir. 1979) (citing Lambert v. California, 355 U.S. 225 (1957)). The intent element which the government had to prove at trial was fraudulent intent on the part of defendant. See 18 U.S.C. §§ 152, 371.

Counsel for both defendants objected to our instruction that the government was not required to prove that the defendants knew that their actions were unlawful. However, the only way in which ignorance of the law could be related to negating fraudulent intent is that defendants acted in good

faith. Counsel for both defendants concurred in our instruction on the good faith defense.

It is important to note that neither defense counsel argued that the principle that ignorance of the law is not a defense is not correct. Nor did they argue that the government is required to prove that defendant knew that his conduct was illegal. Defendant now argues that the confusion of the jury's being told that the government is not required to prove that defendant knew that his actions were illegal, but that good faith on the part of the defendant negates fraudulent intent, deprived him of a fair trial.

There is nothing inherently contradictory or confusing about these principles. Defendant's purported ignorance of the law is <u>not</u> a defense. However,

ignorance of the law may be a factor in the context of the jury's consideration of good faith. Defense counsel expressly accepted the court's re-phrasing of the instruction on the good faith defense. Defendant cannot now be heard to claim that the instruction was insufficient to clarify an alleged ambiguity or point of confusion when it is read in context with the instruction on fraudulent intent.

Moreover, there is no applicable precedent of which this court is aware that requires proof of actual knowledge of the illegality of an act in order for the government to establish fraudulent intent. Defendant recently presented to the court, via facsimile transmission of a letter, two cases which he claims support his position. while it is the policy of the court not to

respond to correspondence, the cases will be considered because neither affects the conclusion we have reached.

The first is United States v. Rhone, 864 F.2d 832, 835 (D.C. Cir. 1989), in which the court noted that there are exceptions to the general proposition that ignorance of the law is not a defense. None of the exceptions listed, however, includes bankruptcy fraud. In fact, requiring knowledge that an act is illegal conflicts with the language of the statutes under which defendant was prosecuted, which require only "fraudulent intent." An intent to cheat in order to deprive another person of property is a lesser standard than an intention to violate the law.

More importantly, the objectionable portion of the instruction given by the trial

court in Rhone was, "And I should point out at this time that ignorance of the law is no excuse." Rhone, supra, 864 F.2d at 834. This instruction goes farther than is proper. The government may prove bad faith on the part of a defendant without providing that the defendant knew that his acts were unlawful. However, the above-quoted instruction leads to the conclusion that a finding that defendant was ignorant of the law compels a finding of bad faith. Our instruction that the government is not required to prove that defendant knew his acts were illegal does not compel such a conclusion.

In United States v. Schilleci, 545 F.2d 519 (5th Cir. 1977), the defendant requested an instruction that ignorance of the law "is to be considered by the jury in determining

whether or not the accused acted or failed to act with specific intent, as charged." Schilleci, supra, at 523-524 (quoting Devitt & Blackmar, Federal Jury Practice and Instructions § 13.04). In the case of fraudulent intent, the intent element is negated by good faith on the part of the defendant. In the instant case, both defense counsel approved the court's instruction regarding good faith. Neither objected to the lack of language similar to the above, and so the case is inapposite.

In short, the issue raised by defendant is not "substantial" within the meaning of § 3143. The instruction given to the jury is an accurate statement of the law, as conceded by defendant. While ignorance of the law may be considered by a jury in its determination of good faith in the context of fraudulent

intent, the government may prove a lack of good faith without proving that defendant knew that his conduct was illegal. Moreover, the good faith instruction by the court was approved by defendant.

NOW, THEREFORE, IT IS ORDERED THAT:

Defendant Alex A. Mervis' motion (record document no. 122) for release pending appeal, termed a motion for bail pending appeal, is denied.

James F. McClure,Jr. /s/
James F. McClure, Jr.
United States District
Judge